Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

KALAMA CHEMICAL, INC. and
ADVANCED TECHNOLOGY LABORATORIES, INC.,

Petitioners,

vs.

STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Washington, Division II

PETITION FOR WRIT OF CERTIORARI

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83 pp

QUESTIONS PRESENTED

1. Is it a taking when a State compels the payment of discriminatory taxes without a predeprivation hearing and fails to provide a remedy after this Court holds, in a prior case involving these same Petitioners, that the discriminatory taxes are unconstitutional?

2. May the remedy for discriminatory taxes on manufacturers engaged in interstate, but not intrastate, commerce leave the discrimination in place?

3. May a State offer at the time discriminatory taxes are paid a refund remedy and then not provide that remedy after this Court holds the discriminatory taxes unconstitutional?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

RULE 29.6 LISTING

The parent company of Petitioner, Kalama Chemical, Inc. is PMD Group Inc. The parent company of Petitioner, Advanced Technology Laboratories, Inc. is Koninklijke Philips Electronics N.V.

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OPINIONS AND ORDERS ENTERED IN THIS CASE

The Opinion of the Court of Appeals of the State of Washington, Division II, that gives rise to this petition is published at *Kalama Chemical v. State*, 102 Wn. App. 577, 9 P.3d 236 (2000) and is found in App. A. An unpublished Order of the Court of Appeals of the State of Washington, Division II calling for additional briefing is reprinted in App. B. The Order of the Washington Supreme Court denying Petitioners' petition for review is published at 143 Wn.2d 1006, 20 P.3d 944 (2001) and is found in App. C. The Opinion and Orders of the trial court in this case are unpublished. They are reprinted in App. B.

JURISDICTION

The Opinion of the Court of Appeals of the State of Washington sought to be reviewed is dated September 15, 2000. The Washington State Supreme Court denied Petitioners' petition for review on March 6, 2001. This Court has jurisdiction to review this petition and the Court of Appeals decision pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Provisions

Art. I, § 8 (The Commerce Clause): "The Congress shall have power . . . To regulate Commerce . . . among the several States . . . . "

Amend. V (The Takings Clause): "[N]or shall private property be taken for public use, without just compensation."

Amend. XIV (The Due Process Clause): "[N]or shall any State deprive any person of life, liberty, or property without due process of law. . . . "

Washington State Statutes[1]

RCW 4.56.110
RCW 19.52.020
RCW 82.04.240
RCW 82.04.250
RCW 82.04.270
RCW 82.04.4286
RCW 82.04.440 (former, amended 1987)
RCW 82.04.440
RCW 82.32.050
RCW 82.32.060
RCW 82.32.090
RCW 82.32.150
RCW 82.32.180
RCW 82.32.210
RCW 82.32.215
RCW 82.32.220

STATEMENT OF THE CASE

This case concerns what minimally adequate remedy is required when interstate commerce is coerced into

[1] Reprinted in App. D.

paying unconstitutionally discriminatory taxes and what remedy and cause of action exists when a State fails to provide such a minimally adequate remedy.

Kalama Chemical, Inc. ("Kalama") and Advanced Technology Laboratories, Inc. ("ATL"), Petitioners, both manufactured products in Washington that they sold outside the State. For the privilege of manufacturing, both companies were coerced into paying Washington manufacturing business and occupation taxes for the period January 1, 1980 through July 23, 1987. App. A at A2. That is, if the taxes were not paid the companies were subject to penalties, interest and business closure.[2] Washington State provided no meaningful opportunity for a hearing prior to payment of the taxes.[3] At the time the taxes were paid, the statutory remedy for payment of unconstitutional taxes was a refund.[4] *See*, App. A at A3.

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[2] *See*, RCW 82.32.050, RCW 82.32.090, RCW 82.32.150, RCW 82.32.210, RCW 82.32.215 and RCW 82.32.220. *See generally, McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 at 38 n.21 (1990) ("We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure.").

[3] *See, Tyler Pipe Industries, Inc. v. Department of Revenue*, 96 Wn.2d 785, 791, 638 P.2d 1213 (1982) ("*Tyler I*") (Denying injunctive relief because the "statutory scheme at issue provides the legal remedy of a refund suit. . . . "); *See also*, RCW 82.32.150 and RCW 82.32.180.

[4] *National Can Corp. v. Department of Revenue*, 109 Wn.2d 878, 880-81, 749 P.2d 1286 (1988); *See also*, RCW 82.04.4286 and RCW 82.32.060.

Petitioners, along with a number of other companies, previously sought a refund of the taxes paid between January 1, 1980 and June 19, 1985 in *National Can Corp. v. Department of Revenue*, 105 Wn.2d 327, 715 P.2d 128, *corrected*, 732 P.2d 134 (1986) (*National Can I*) *vacated, Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232 (1987) (*Tyler II*).[5] In that action, this Court held the Washington manufacturing tax imposed on Petitioners unconstitutionally discriminatory.

The constitutional defect with the tax is plain. The manufacturing tax would not have been imposed on Petitioners if they sold their products in Washington. Former RCW 82.04.440 (amended 1987). *See also*, RCW 82.04.240, RCW 82.04.250 and RCW 82.04.270. The manufacturing tax was only imposed on companies manufacturing in Washington and selling outside the State. Companies that manufactured in Washington and sold locally were not subject to the manufacturing tax. Instead, they were subject to one of the State's selling taxes. The State argued that the selling taxes imposed on local commerce compensated for the manufacturing taxes imposed solely on interstate commerce. As manufacturing and selling are not substantially equivalent events, this Court rejected the State's proffered defense and held the manufacturing tax to be facially discriminatory. *Tyler II*, 483 U.S. at 240-44.

Washington's tax system was also held to be internally inconsistent. A Washington manufacturer selling in

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[5] *Tyler Pipe II* was a consolidated appeal from *National Can I* and *Tyler I*.

Washington only paid the selling tax. But, if Washington's tax system was applied in every state, a Washington manufacturer selling outside the State would pay Washington's manufacturing tax and would also pay a selling tax in the state of sale. Thus, interstate commerce bore a heavier tax burden than local commerce. This lack of internal consistency resulted in Washington's tax being unfairly apportioned as well as discriminatory.[6] *Tyler II*, 483 U.S. at 247-48.

On remand, the Washington Supreme Court applied *Tyler II* prospectively only and denied Petitioners any retroactive relief. *National Can Corp. v. Department of Revenue*, 109 Wn.2d 878, 749 P.2d 1286 (1988) ("*National Can II*"). After the denial of any retroactive relief by the Washington Supreme Court, Petitioners sought review in this Court of their rights to a refund of the taxes paid prior to June 19, 1985. This Court denied that petition for certiorari.

After the denial of the petition for certiorari, these Petitioners filed this action in Washington State Superior Court. In this action, Petitioners claim that the denial of any retroactive remedy by the Washington Supreme Court was the final step necessary to complete the State's taking of Petitioners' property without just compensation. Thus, in this action Petitioners seek relief for Washington State committing the constitutional tort of a

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[6] The Court went on to discuss in the context of Washington's selling taxes how a credit system might cure the lack of internal consistency. *Tyler II*, 483 U.S. at 249.

taking.[7] The property taken by Washington was (i) money[8]; (ii) the vested right to a statutory refund of that money[9]; and (iii) the substantive due process right to a clear and certain remedy for the illegal forced payment of the money[10]. Petitioners also seek for the first time in this action a refund of the unconstitutional taxes they paid between June 19, 1985 and July 23, 1987.[11]

Prior to this action being heard by the trial court, the Washington Supreme Court overruled its *National Can II* decision in *Digital Equipment Corporation v. Department of Revenue*, 129 Wn.2d 177, 916 P.2d 933 (1996).[12] This Court

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[7] Petitioners raised the federal question of a taking requiring just compensation in their complaints. App. E.

[8] ATL was coerced into paying approximately $1,148,000 to the State in illegal taxes during the period January 1, 1980 through June 19, 1985. Kalama was similarly coerced into paying approximately $511,000 during the same time period. *See*, App. A at A3.

[9] *See generally, Ettor v. Tacoma*, 228 U.S. 148 (1913) (Repeal of a statute requiring Tacoma to compensate for damage that already has occurred deprived damaged party of vested right) and *see, Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922) (State legislature cannot take away a right to recover money that is due when the legislative act is passed).

[10] *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990). At a minimum "the State's duty under the Due Process Clause to provide a 'clear and certain remedy' requires it to ensure that the tax as *actually imposed* on petitioner and its competitors during the contested tax period does not deprive petitioner of tax moneys in a manner that discriminates against interstate commerce." *Id.* at 43.

[11] Petitioners' complaints raised the refund claim for taxes paid between June 19, 1985 and July 23, 1987. *See*, App. E.

[12] *Digital* held that a retroactive remedy was appropriate and in the context of an out-of-state manufacturer selling in

also announced its decisions in *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990) (At a minimum "the State's duty under the Due Process Clause to provide a 'clear and certain remedy' requires it to ensure that the tax as *actually imposed* on petitioner and its competitors during the contested tax period does not deprive petitioner of tax moneys in a manner that discriminates against interstate commerce"), *Reich v. Collins*, 513 U.S. 106 (1994) (States may not bait and switch by offering a refund remedy at the time of payment and then deny a refund at the postdeprivation hearing), and *Newsweek, Inc. v. Florida*, 522 U.S. 442 (1998).

The trial court held that Petitioners' refund claims for taxes paid between June 19, 1985 and July 23, 1987 were barred by collateral estoppel and that their claims for just compensation for their property taken by the State were barred by res judicata. App. B at B4. Inconsistent with its holding that collateral estoppel barred the refund claim, the trial court still awarded Petitioners credits for certain selling taxes they paid to other states on products manufactured between June 19, 1985 and July 23, 1987. App. B at B4-B5. In *National Can II*, the decision that formed the basis for the collateral estoppel decision of the trial court, Petitioners were awarded no such relief.

After the application of the credit remedy afforded by the trial court, Petitioners still were subject to the manufacturing tax. Local commerce was still exempt from the manufacturing tax for the periods involved in the

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Washington awarded credits for certain taxes paid to other states.

litigation. Neither the trial court nor any statute has ever imposed the manufacturing tax on Washington manufacturers selling in Washington for the time periods involved in this case. Thus, the Washington manufacturing tax paid by these Petitioners remained facially discriminatory.

Petitioners timely appealed to the Court of Appeals of the State of Washington, Division II. After oral argument, the Court of Appeals entered an Order calling for additional briefing from both parties on the following issues:

> (1) Under *W.R. Grace v. State*, 137 Wn.2d 580, 973 P.2d 1011 (1999), are Kalama and ATL entitled to credits for B&O taxes paid to Washington between 1980 and 1985?
>
> (2) If taxpayers are entitled to apply for credits for the period 1980 to 1985, what affect, if any, does this have on the takings claim?

In crafting its remedy, the Court of Appeals did not distinguish between taxes paid between June 19, 1985 and July 23, 1987 for which refund is being sought and the taxes paid between January 1, 1980 and June 19, 1985 on which the takings claim is based. Rather the Court of Appeals concluded that "Kalama and ATL are entitled to credits, not refunds, for B&O manufacturing taxes paid between 1980 and 1987 if they paid manufacturing or selling taxes to other jurisdictions for the same products." App. A at A5.[13]

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[13] While the Court of Appeals affirmed the trial court, its grant of credits for the entire period January 1, 1980 through

Again, after application of the more time-expansive credit remedy afforded by the Court of Appeals, Petitioners still were subject to the manufacturing tax. Local commerce was still exempt from the manufacturing tax for all time periods involved in the litigation. Neither a court nor a statute has ever imposed the manufacturing tax on Washington manufacturers selling in Washington for any time period involved in this case. Thus, the Washington manufacturing tax actually imposed on these Petitioners remains facially discriminatory.

The Court of Appeals concluded that the providing of credits in this case resulted in the State not taking Petitioners' property without just compensation. It rejected Petitioners' claim for a return of the illegal taxes with interest reasoning that the "constitutional problem with the tax before 1987 was that it could discriminate against interstate manufacturers who might be subject to a comparable tax on goods in another state." The Court of Appeals held that the "1987 two-way credit system eliminated this constitutional defect . . . (citations omitted) . . . [a]nd because the credit system was intended to be, and has been held to be, retroactive, Kalama and ATL have suffered no discriminatory double taxation." App. A at A6.[14]

July 23, 1987 enlarged the remedy provided by the trial court and is inconsistent with the trial court's holding that the takings claim was barred by res judicata. The trial court had awarded no relief for the period before June 19, 1985. The relief awarded by both the trial court and the Court of Appeals is inconsistent with holding that the refund claim is barred by collateral estoppel.

[14] The 1987 credit system imposed the manufacturing tax *prospectively* on all parties manufacturing in Washington and (a)

Petitioners timely petitioned the Washington Supreme Court for review of the Court of Appeals' decision. On March 6, 2001, the Washington Supreme Court denied the Petition without further opinion.

REASONS FOR GRANTING THE WRIT

I. The State Court's Decision Denying That Petitioners' Property Was Taken Without Just Compensation Conflicts With Relevant Decisions of This Court.

Petitioners were required to pay unconstitutional taxes. Petitioners fully exhausted their state law procedural remedies to recover their money in *National Can I* and *National Can II*. In *National Can II*, the State denied Petitioners any remedy for coercing Petitioners to pay the unconstitutional taxes. At the moment the Washington Court's decision became final, Petitioners' cause of action for the constitutional tort accrued.

The denial of any retroactive remedy in *National Can II* was the final State action necessary for Washington

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provided credits to Washington's selling tax if the goods were sold in Washington and (b) provided credits to the manufacturing tax if the goods were sold outside of Washington and a tax substantially equivalent to Washington's selling taxes was imposed on the Washington manufacturer by the foreign state. While the legislature intended to have the credits apply retroactively, the legislation did not require, and no court has required, that the manufacturing tax be *retroactively* imposed on Washington manufacturers selling in Washington. *See* RCW 82.04.440.

State to take Petitioners' property without just compensation. The property taken was (i) money; (ii) the vested right to a statutory refund of that money; and (iii) the substantive due process right to a clear and certain remedy for the illegal forced payment of the money. Thus, ATL and Kalama are here seeking just compensation.

The Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."[15]

The Amendment does not prohibit the taking of property. Rather, the Amendment only requires that states provide just compensation for taking property. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 at 314-15 (1987) ("[T]he Amendment makes clear that it is designed not to limit governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.") *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 at 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.").

The Fifth Amendment is a self-executing provision of the Constitution. The Amendment limits governmental power to take property by providing a specific remedy,

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[15] "The Fifth Amendment applies against the States through the Fourteenth Amendment." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 175 n.1 (1979). *See also, San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 623 n.1 (1981).

just compensation for such state action.[16] Thus, a state cannot change the remedy for a taking. *See generally, Regional Rail Reorganization Act Cases*, 419 U.S. 102, 151 (1974) and *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326-27 (1893). Whenever there is a taking, the remedy must be just compensation.

States are not required to pay just compensation in advance of or contemporaneous with a taking. "Instead, the Constitution is satisfied by the provision of meaningful postdeprivation process. Thus, the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss'." *Williamson County*, 473 U.S. at 195. *See also, Parratt v. Taylor*, 451 U.S. 527 (1981). Stated differently, compensation must first be sought through the procedures the State has provided before a claim for just compensation is ripe. *See, Williamson County*, 473 U.S. at 194; *see also, First English*, 482 U.S. at 312 n.6.

In this case, the State required Petitioners to turn over their property when it forced them to pay illegal taxes. Petitioners then sought relief through the refund procedures the State provided. Having been denied relief, and only by being denied relief, Petitioners' constitutional tort cause of action became justiciable.[17]

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[16] *See generally, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-16 (1987) and *San Diego Gas & Electric. Co. v. San Diego*, 450 U.S. 621, 655 n.21 (1981) (Brennan, J. dissenting).

[17] Thus, res judicata cannot bar Petitioners' tort claim as the claim did not accrue until after *National Can II* was decided.

Evaluating Petitioners' tort claim is relatively easy. Petitioners' property was taken under color of state tax law. It has long been understood that taxes are paid under duress whenever the state does not provide a fair and meaningful predeprivation hearing and payment is required to avoid penalties, interest and business closure. *See, McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 38 n.21 (1990); *United States v. Mississippi Tax Comm'n*, 412 U.S. 363, 368 (1973); *Ward v. Love County*, 253 U.S. 17, 23 (1920); *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468, 471 (1912) and *Atchison T. & S.F.R.Co. v. O'Connor*, 223 U.S. 280, 285-86 (1912). Here, payment was made to avoid penalties, interest and business closure. Payment was also required as a condition of challenging the illegal tax. Thus, the State illegally and forcibly seized Petitioners' property.[18]

Consistent with Washington State procedure, Petitioners paid the illegal taxes and sought to obtain a remedy through court action. They successfully demonstrated the taxes were illegal. Nevertheless, the Washington Supreme Court denied them any relief. In hindsight,

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[18] It is of no import that the taking arose under color of a state tax law. The supposed taxing authority for the State's illegal act does not alter the constitutional obligation of the State. *See generally, Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478 (1916); *Village of Norwood v. Baker*, 172 U.S. 269, 278 (1898); *Brushaber v. Union Pacific Railroad*, 240 U.S. 1, 24-25 (1915); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Atchison T. & S.F.R.Co. v. O'Connor*, 223 U.S. 280, 287 (1912); *Ward v. Love County*, 253 U.S. 17, 24 (1920); *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930); *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499, 504-05 (1928); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931).

even the Washington Supreme Court knows the denial of relief was wrong.[19] More importantly, it was also the final step necessary to complete the State's taking of Petitioners' property without just compensation. At that moment, the constitutional cause of action for a taking arose. The constitutional tort now being complete, the State's obligation to pay just compensation is constitutionally mandated.

The State Court of Appeals was clearly concerned with Petitioners' takings claim. By Order, it required additional briefing after oral argument on the issue. Specifically, the State Court wanted to know whether granting Petitioners credits would defeat their takings claim. App. B.

After the additional briefing, the State Court of Appeals concluded that the granting of credits in this case defeated the takings claim. The State Court reasoned "because the constitutional flaw in the statute was not a lack of state authority to impose it, the tax, before 1987, was not a nullity. (citation omitted). It follows that the State has not taken Kalama's and ATL's property without just compensation. The State was entitled to collect the manufacturing tax from Kalama and ATL between 1980 and 1987 so long as Kalama and ATL were not subject to out-of-state taxation on the same activity." App. A at A6.

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[19] The Washington Supreme Court overruled its *National Can II* decision in *Digital Equipment Corporation v. Department of Revenue*, 129 Wn.2d 177, 916 P.2d 933 (1996).

The State Court erred in failing to recognize that according to the decisions of this Court the constitutional tort of a taking accrued at the time the State Supreme Court denied any remedy in *National Can II*.[20] The prosecution of that case was the complete exhaustion of the State law procedures for relief.[21]

Once those procedures were exhausted, it became too late for the State to avoid the taking, and the concomitant obligation to pay just compensation.

II. The Remedy Provided By Washington's Court of Appeals Is Inadequate and Inconsistent With Decisions of This Court.

A. Washington's Credit Remedy Provides Little Relief.

The remedy afforded Petitioners by the Court of Appeals decision for both their takings claim (related to taxes paid between January 1, 1980 and June 19, 1985) and their refund claim (related to taxes paid between June 19, 1985 and July 23, 1987) is a credit to the tax paid for the amount of similar gross receipt manufacturing or

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[20] For the reasons expressed in Part II, C, *supra*, the Court of Appeals also erred in concluding that retroactive credits alone cured the discrimination.

[21] The failed prosecution of the state law causes of action is why the State argued and the trial court agreed that the takings claim was barred by res judicata. But for Petitioners' federal cause of action for a taking, Petitioners would not now be able to state any claim for relief for the time period related to the takings claim.

selling taxes that the Petitioners paid to other jurisdictions on the same goods.

Petitioner, ATL paid Washington manufacturing taxes of $1,628,000 and in addition paid $6,591 of similar gross receipt selling and/or manufacturing taxes to other jurisdictions on the same products. The decision of the Court of Appeals would result in a refund to ATL of only $6,591 plus refund interest. Petitioner, Kalama paid approximately $869,000 of Washington manufacturing taxes and did not pay any similar gross receipt selling and/or manufacturing taxes on the same goods to other jurisdictions. The decision of the Court of Appeals would result in Kalama receiving no refund.

B. Just Compensation Is The Only Permissible Remedy For A Taking.

While the compensation for legal taxes is the enjoyment of living in a civilized society, *Compania General De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) or the enjoyment of a privilege that a State could otherwise withhold, the Constitution provides that the compensation for property illegally taken by the government must be "just compensation." In giving content to the just compensation requirement, the Supreme Court has required the owner to be returned to as good a position pecunarily as if his property had not been taken. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979); *Olson v. United States*, 292 U.S. 246, 255 (1934).

Here, there is no difficulty in valuing the property taken. It was money. The compensation for money must

be the same amount of money.[22] In addition, Washington law provides for 12% interest on liquidated claims. *See generally,* RCW 4.56.110, RCW 19.52.020 and *Pederson's v. Transamerica Ins.,* 83 Wn. App. 432, 922 P.2d 126 (1996). Petitioners' just compensation claim is for a liquidated amount. This Court has held that where property is taken and later returned, compensation for the temporary deprivation of the property must be made. *First English,* 482 U.S. at 320, 321. Compensation for the temporary deprivation of money is interest. Thus, Petitioners are entitled to a return of the amount of money the State illegally obtained plus interest at the rate of 12% from the date of the taking. No other compensation will be just, and the Constitution requires just compensation.

C. The Facial Discrimination This Court Held Unconstitutional In *Tyler II* Remains In Place.

Petitioners are Washington manufacturers selling goods outside the State. Petitioners were required to pay the Washington manufacturing tax. RCW 82.04.240. Other

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[22] The other property taken by the State, the vested right to a statutory refund of the money and the substantive due process right to a clear and certain remedy for the illegal forced payment of the money, are similarly equal in value to the money. At first glance, returning the money taken with interest appears to fully compensate for the taking of the other property. On further examination, however, it may be appropriate to compensate Petitioners for their costs and fees in being forced to litigate their entitlement to relief. Such an additional award appears to be part of just compensation as it is necessary to return Petitioners to the *status quo ante* the denial of the vested statutory right and the substantive due process right to a clear and certain remedy.

Washington manufacturers not engaging in interstate commerce did not have to pay that tax. Former RCW 82.04.440 (amended 1987). Petitioners would not have had to pay the manufacturing tax if they sold their goods in Washington.

Only subjecting Washington manufacturers who engaged in interstate commerce to the manufacturing tax violates the Commerce Clause. "[A] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984) *quoted in Tyler II*, 483 U.S. at 240-41.[23]

The State Court failed to recognize that imposing the manufacturing tax only on interstate commerce was a reason the tax was unconstitutionally discriminatory. The only constitutional defect the State Court observed "was that it (the tax) could discriminate against interstate manufacturers who might be subject to a comparable tax on goods in another state." App. A at A6.

The granting of credits solved the lack of internal consistency, but credits fail to remedy the discrimination resulting from only imposing the manufacturing tax on

---

[23] The fact that Washington subjected Washington manufacturers selling in the State to a selling tax is of no import. Manufacturing and selling are not substantially equivalent events so that a tax on one can compensate for the lack of a tax on the other. Thus, the tax imposed on these Petitioners is facially discriminatory and unconstitutional. *See, Tyler II*, 483 U.S. at 240-44.

interstate commerce. Credits do not result in a Washington manufacturer selling locally paying the manufacturing tax that Petitioners were forced to pay. Credits do not result in either Kalama or ATL not paying the manufacturing tax. Thus, even after application of the credits, Washington's manufacturing tax remains discriminatory in hindsight because the State will tax the event of manufacturing goods sold in interstate commerce but not the event of manufacturing goods sold locally.[24] *Armco* and *Tyler II* are directly on point.

As it leaves the manufacturing tax facially discriminatory, the credit remedy is an insufficient remedy according to:

(i) *McKesson*, 496 U.S. at 43 ("[T]he State's duty under the Due Process Clause to provide a 'clear and certain remedy' requires it to ensure that the tax as *actually imposed* on petitioner and its competitors during the contested tax period does not deprive petitioner of tax moneys in a manner that discriminates against interstate commerce . . . ") and

(ii) *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928) (holding that a party forced to pay a discriminatory tax is entitled to a refund of the excess tax paid – unless the disparity is removed in some other manner).

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[24] The State Court wrote, "the credit system was intended to be, and has been held to be, retroactive", and the State Court retroactively applied the credits, but not the manufacturing tax. App. A at A6. Thus, the tax remains only imposed on interstate commerce.

Therefore, the credit remedy actually applied by the State is impermissible.

Today, a full refund with interest is the only permissible remedy that can retroactively cure the manufacturing tax discrimination. Petitioners, Washington manufacturers selling in interstate commerce, cannot be subject to a tax they would not pay if they only engaged in local commerce. Even if the State had at one time the opportunity to correct that inequality by imposing the manufacturing tax retroactively on Washington manufacturers selling locally,[25] the time for that potential course of action has long passed.

It has been more than 12 years since *National Can II*. The State has shown no willingness to retroactively impose the manufacturing tax. A similar problem arose in *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931). As explained in *McKesson*, 496 U.S. at 35-36:

> The Court held unanimously that the State of Iowa's taxation of the shares of state and national banks at a higher rate than those of competing domestic corporations violated the Equal Protection Clause. With respect to the banks' claim for a refund of excess taxes paid, Justice Brandeis explained
>
> 'The [banks'] rights were violated, and the causes of action arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, promptly

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[25] For the reasons expressed in Part II, D, *supra*, the State never had the right to deny the statutory refund remedy.

> upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the [banks'] grievances would have been redressed, for these are not primarily over-assessment. The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced.'
>
> But the State did not elect to set matters right by collecting additional taxes from the banks' competitors for the four tax years encompassed by the suit. And the Court found it 'well settled' that the banks could not be 'remitted to the necessity of awaiting such action by the state officials upon their own initiative.' The Court held, therefore, that the banks were 'entitled to obtain in these suits refund of the excess of taxes exacted from them'. (citations omitted).

Like the taxpayer in *Iowa-Des Moines National Bank*, Petitioners can no longer be made to await the retroactive imposition of the manufacturing tax against all Washington manufacturers who sold goods locally. Therefore, Petitioners are entitled to obtain in this action a refund of the unconstitutional taxes exacted from them during the second time period (June 19, 1985 through July 23, 1987) in addition to just compensation for the taxes paid during the first time period (January 1, 1980 through June 19, 1985).

D. At The Time Of Payment, Washington Offered These Petitioners A Refund Remedy.

At the time the illegal taxes were coerced from Petitioners, the statutory remedy was a refund. *National Can Corp. v. Department of Revenue*, 109 Wn.2d 878, 880-81, 749 P.2d 1286 (1988) ("If the taxes were collected in violation of the constitution, then the state refund statutes would mandate refunds."); *See also*, RCW 82.04.4286 and RCW 82.32.060.

The State's offering of a refund remedy was not an act of generosity. The State wished to avoid predeprivation remedies. Washington State provides no meaningful opportunity for a hearing prior to payment of taxes and injunctions generally may not be obtained so long as the clear and certain remedy of a refund exists.[26]

In *Reich v. Collins*, 513 U.S. 106 (1994), Georgia held out what plainly appeared to be a clear and certain postdeprivation remedy, a tax refund, and then declared, only after the disputed taxes had been paid, that no such remedy existed. Although states may maintain remedial schemes that are exclusively predeprivation, exclusively postdeprivation, or hybrid and may reconfigure their schemes over time to fit changing needs, *Reich* made clear that states may not "bait and switch" by reconfiguring after payment. States cannot offer a refund at the time of

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[26] *See, Tyler Pipe Industries, Inc. v. Department of Revenue*, 96 Wn.2d 785, 791, 638 P.2d 1213 (1982) (Denying injunctive relief because the "statutory scheme at issue provides the legal remedy of a refund suit. . . . "); *See also*, RCW 82.32.150 and RCW 82.32.180.

payment and then claim that remedy is unavailable after the postdeprivation hearing finds the tax illegal.

Following *Reich*, the Court issued its per curiam decision in *Newsweek, Inc. v. Florida*, 522 U.S. 442 (1998). *Newsweek* again involved a situation where a state offered a refund remedy at the time of payment and then after payment developed an alternative remedy. Again, the Court rejected the alternative. Newsweek, "who reasonably relied on the apparent availability of a postpayment refund when paying the tax" had to be afforded that remedy. States may not "bait and switch". Fundamental fairness and due process compel states that have chosen statutory schemes offering refund remedies and no predeprivation relief to provide the refund remedy on which taxpayers reasonably rely.[27] *Id.*

The law is now clear enough that the State wrote below: "States cannot 'bait and switch' by offering a postdeprivation remedy, and then withdrawing that remedy after the taxes are paid."[28] App. E at E9. But that is

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[27] The Court followed *Newsweek* with its vacation of a Florida State court decision in *Dryden v. Madison County*, 522 U.S. 1145 (1998). The *Reich*, *Newsweek* and *Dryden* series of cases are entirely consistent with the vested right analysis of the Court's earlier decisions in *Ettor v. Tacoma*, 228 U.S. 148 (1913) (Repeal of a statute requiring Tacoma to compensate for damage that already has occurred deprived damaged party of vested right) and *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922) (State legislature cannot take away a right to recover money that is due when the legislative act is passed).

[28] The State then argued that the credit remedy was an appropriate remedy. The State misses the point. Having offered a refund remedy, that particular remedy cannot be withdrawn.

exactly what Washington has done. It offered ATL and Kalama a refund remedy when they paid the illegal tax. Once the tax was declared unconstitutional, however, the State withdrew the remedy. First, in *National Can II*, it afforded no retroactive remedy. Now, it offers a different retroactive remedy, limited credits. The Court's prior decisions make clear that ATL and Kalama must receive the refund remedy that was reasonably relied upon. But, unless the Court grants certiorari, the State will have avoided predeprivation hearings by promising the clear and certain remedy of a refund, and then after being successfully challenged, the State will have avoided providing that remedy by switching remedies.

III. CONCLUSION

For the reasons expressed above, this petition for writ of certiorari to review the decision of the Court of Appeals of the State of Washington should be granted.

DATED this 14 day of May, 2001.

FRANKLIN G. DINCES
Counsel of Record

Otherwise, the State will have baited taxpayers with the promise of a clear and certain remedy, a refund, and then switched the remedy that is available. Switching remedies results in the State's remedy being unclear and uncertain.

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KALAMA CHEMICAL, INC. and ADVANCED TECHNOLOGY LABORATORIES, INC., Appellants, v. STATE OF WASHINGTON, Respondent.	No. 24358-0-II PUBLISHED OPINION Filed: SEP 15 2000

ARMSTRONG, C.J. – Kalama Chemical, Inc. and Advanced Technology Laboratories, Inc. (ATL), two companies that manufacture products sold primarily out of the state, sued the State of Washington for taking their property without just compensation and for not refunding taxes paid. The takings claim is based upon Washington Business & Occupation (B&O) taxes collected between 1980 and 1985. The United States Supreme Court found the taxes to be unconstitutional under the Commerce Clause. *Tyler Pipe Indus., Inc. v. Department of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987) (*Tyler Pipe II*). But on remand, the Washington Supreme Court denied the taxpayers a refund, holding that *Tyler Pipe II* applied prospectively only. *National Can Corp. v. Department of Revenue*, 109 Wn.2d 878, 749 P.2d 1286 (1988) (*National Can II*), *overruled by Digital Equip. Corp. v. Department of Revenue*, 129 Wn.2d 177, 916 P.2d 933 (1996).

In response to *National Can II*, the Washington Legislature amended the refund statute, providing a tax credit rather than a refund for taxes unlawfully collected. Kalama and ATL contend that the State's collection of the taxes followed by the court's holding in *National Can II* amounted to an unconstitutional taking, requiring just compensation. Kalama and ATL also claim a refund, under RCW 82.32.180, for B&O taxes paid between June 20, 1985, and July 23, 1987.

The trial court granted summary judgment for the State, ruling that res judicata barred the claim for taxes paid between 1980 and 1985 and that collateral estoppel barred the claim for taxes paid between 1985 and 1987. The issues raised have been decided by the Washington Supreme Court. Kalama and ATL are limited to a credit for taxes unlawfully collected; the credit scheme applies to taxes paid between 1980 and 1987; and the credit system does not violate the Commerce Clause. We affirm.

FACTS

Kalama and ATL manufacture products in Washington, which are primarily sold in other states. Both companies paid Washington manufacturing B&O taxes from January 1, 1980, through July 23, 1987. The taxes, according to Kalama and ATL, were paid "under threat of penalties, interest and business closure."

Both parties, along with a number of other companies, sought a refund of B&O taxes paid through June 19, 1985, in *National Can Corp. v. Department of Revenue*, 105 Wn.2d 327, 732 P.2d 134 (1986) (*National Can I*), *vacated, Tyler Pipe II*, 483 U.S. 232. The Washington

Supreme Court held that the B&O tax statute, RCW 82.04.440, did not violate the Commerce Clause. *National Can I*, 105 Wn.2d at 330, 343. On appeal, the United States Supreme Court held that the Washington B&O tax discriminated against interstate commerce in violation of the Commerce Clause. *Tyler Pipe II*, 483 U.S. at 248.[1] On remand, our Supreme Court held that *Tyler Pipe II* applied prospectively only. *National Can II*, 109 Wn.2d at 895. Therefore, Kalama and ATL's request for retroactive relief, in the form of a tax refund, was denied. *National Can II*, 109 Wn.2d at 895.

In 1989, Kalama and ATL filed their current complaints seeking just compensation and a refund of taxes paid. Kalama seeks compensation for approximately $511,000 paid between 1980 and 1985, as well as a refund for approximately $358,000 paid between 1985 and 1987. ATL seeks compensation for approximately $1,148,000 paid between 1980 and 1985, as well as a refund for approximately $480,000 paid during 1985 and 1987. Kalama did not pay any gross receipts taxes to other states during this time period. ATL claims to have paid $6,591 in gross receipts taxes to other states during this period.

At the time Kalama and ATL paid the taxes, a taxpayer could sue for a refund of taxes wrongly collected. Former RCW 82.32.180 (1987). In 1987, the Washington Legislature responded to the holding in *Tyler Pipe II* by amending the B&O tax exemption statute and replacing

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[1] *Tyler Pipe II* was a consolidated appeal from *National Can I*, 105 Wn.2d 327 and *Tyler Pipe Indus., Inc. v. Department of Revenue*, 105 Wn.2d 318, 715 P.2d 123 (1986) (*Tyler Pipe I*).

the multiple activities exemption with a two-way credit scheme.[2] Former RCW 82.04.440 (1987). The two-way credit scheme applies retroactively. Laws of 1987, 2d Ex. Sess., ch. 3, § 3. *See also W.R. Grace & Co. v. Department of Revenue*, 137 Wn.2d 580, 584, 973 P.2d 1011, *cert. denied*, 120 S. Ct. 371 (1999).

ANALYSIS

I. Summary Judgment Standard of Review

When reviewing an order of summary judgment, we engage in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law CR 56(c). Here, the summary judgment involves only questions of law.

II. Refund of B&O taxes paid between January 1980 and July 23, 1987

Kalama and ATL, relying on United States Supreme Court cases decided after *National Can II*, argue that Washington must refund unconstitutional taxes. Washington, according to Kalama and ATL, may not hold out a

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[2] In a one-way credit scheme a taxpayer would receive credit against the manufacturing tax for wholesale tax paid to another state. A two-way credit scheme adds a credit against wholesale taxes for manufacturing taxes paid to another state to the one-way credit scheme.

refund as an available remedy at the time the taxes are paid, and then deny the refund after the taxes are paid. *See Newsweek, Inc. v. Florida*, 522 U.S. 442, 118 S. Ct. 904, 139 L. Ed. 2d 888 (1998); *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994).

The same argument was rejected by our Supreme Court in *W.R. Grace*. The court held that the "bait and switch" arguments of *Newsweek* do not apply because the "credits provided in the 1987 remedial statute are the appropriate remedy in this instance." *W.R. Grace*, 137 Wn.2d at 599. And the credit system applies retroactively to taxes paid before 1987. *W.R. Grace*, 137 Wn.2d at 603. Thus, Kalama and ATL are entitled to credits, not refunds, for B&O manufacturing taxes paid between 1980 and 1987 if they paid manufacturing or selling taxes to other jurisdictions for the same products.[3]

Kalama and ATL contend, however, that *W.R. Grace* is not controlling for the taxes paid between 1980 and 1985. They argue that *W.R. Grace* was an action for a refund and the action here is a new, independent action under the Fifth Amendment for a taking without just compensation. And, according to Kalama and ATL, the only just compensation for collecting an unconstitutional tax is the same amount of money plus interest. This argument assumes that the manufacturing tax, as it existed before 1987, was a nullity as a result of the United States Supreme Court decision holding it unconstitutional. *American Nat'l Can Corp. v. Department of Revenue*, 114

[3] The State concedes that Kalama and ATL are entitled to credits for taxes paid to other states since 1980.

Wn.2d 236, 787 P.2d 545 (1990); *Digital*, 129 Wn.2d 177; and *W.R. Grace*, 137 Wn.2d 580, teach otherwise.

The constitutional problem with the tax before 1987 was that it could discriminate against interstate manufacturers who might be subject to a comparable tax on goods sold in another state. *Tyler II*, 483 U.S. at 248. The 1987 two-way credit system eliminated this constitutional defect. *American Nat'l Can*, 114 Wn.2d at 249; *Digital*, 129 Wn.2d at 194; *W.R. Grace*, 137 Wn.2d at 603-04. And because the credit system was intended to be, and has been held to be, retroactive, Kalama and ATL have suffered no discriminatory double taxation. Finally, because the constitutional flaw in the statute was not a lack of State authority to impose it, the tax, before 1987, was not a nullity. *W.R. Grace*, 137 Wn.2d at 595-96. It follows that the State has not taken Kalama and ATL's property without just compensation. The State was entitled to collect the manufacturing tax from Kalama and ATL between 1980 and 1987 so long as Kalama and ATL were not subject to out-of-state taxation on the same activity. The retroactive credit system prevents such double taxation. Kalama and ATL are entitled to a credit for any comparable tax paid out-of-state on the same goods during the same period.

We affirm.

/s/ Armstrong, C.J.
ARMSTRONG, C.J.

We concur:

/s/ Houghton, J.
HOUGHTON, J.

/s/ Bridgewater, J.
BRIDGEWATER, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KALAMA CHEMICAL, INC. and ADVANCED TECHNOLOGY LABORATORIES, INC. Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	No. 24358-0-II ORDER CALLING FOR ADDITIONAL BRIEFING Filed: January 24, 2000

Pursuant to RAP 10.1H, this court requests additional briefing from the parties, addressing the following questions:

(1) Under *W.R. Grace v. State*, 137 Wn.2d 580, 973 P.2d 1011 (1999), are Kalama and ATL entitled to credits for B&O taxes paid to Washington between 1980 and 1985?

(2) If taxpayers are entitled to apply for credits for the period 1980 to 1985, what affect, if any, does this have on their takings claims?

The supplemental brief of appellants is due 30 days from the date of this order. Respondent's reply to the supplemental brief is due 20 days after appellants' brief is

filed. The supplemental briefs shall not exceed 15 pages in length.

IT IS SO ORDERED.

DATED this 24th day of January, 2000.

/s/ [Illegible]
ACTING CHIEF JUDGE

cc: Franklin G. Dinces
Anne E. Egeler

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

KALAMA CHEMICAL INC., and ADVANCED TECHNOLOGY LABORATORIES, INC. Plaintiffs, v. STATE OF WASHINGTON, Defendant.	No. 89-2-02968-2 No. 89-2-02926-7 (Consolidated) Summary Judgment Order Dismissing Action With Prejudice (Filed Feb. 1, 1999)

This matter came before the Court for hearing on Plaintiffs' motions for summary judgment on July 31, 1998 and again on September 18, 1998. The Court has previously denied Plaintiffs' motions at the hearing on September 18 and by Order dated October 7, 1998. Consistent with its previous order and decisions, the Court now enters a final summary judgment order dismissing this action with prejudice.

In dismissing this action, the Court has considered its Order of October 7, 1998, the oral arguments of counsel at the hearings on September 18 and July 31, 1998, and the following pleadings and papers filed in these consolidated actions:

1. Plaintiff's Motions for partial Summary Judgment and Memoranda in Support Thereof dated August 10, 1998 and June 19, 1998;

2. Defendant's Memoranda In Opposition To Plaintiff's Motions dated September 4, 1998 and July 20, 1998;

3. Plaintiffs' Rebuttal Memorandum filed September 9, 1998 and July 23, 1998;

4. The Declaration of John Hagen dated October 29, 1997;

5. The Declaration of Tracy Day dated September 8, 1998;

6. The Stipulation and Order regarding Consolidation dated November 6, 1998 and

7. The Complaints and Amended Complaints filed herein –

Based on the oral arguments of Counsel and the pleadings, papers and evidence presented, the Court now finds:

1. No genuine issue of material fact exists with respect to Plaintiffs' claims;

2. Defendant is entitled, as a matter of law, to a summary judgment dismissing Plaintiffs' action with prejudice.

3. For the reasons stated at the hearing, Plaintiffs' claim for just compensation for taxes paid between January 1, 1980 and June 19, 1985 is barred by res judicata;

4. Plaintiffs' claim for a refund of, or just compensation for, taxes paid between June 19, 1985 and July 1987 is barred by collateral estoppel;

5. The State of Washington has agreed to pay Plaintiff Advanced Technology Laboratories a credit for the

amount of gross receipts taxes paid to other jurisdictions between June 19, 1985 and July 1987. The amount of such a credit is $2,621.00.

6. Plaintiff Advanced Technology Laboratories is entitled to interest on the credit referred to above at the statutory rate set forth in RCW 82.32.060.

Therefore, the Court enters an Order requiring the State of Washington to pay Advanced Technology Laboratories a refund of $2,621.00 plus statutory interest.

The Court further Orders that Plaintiffs' causes of action otherwise be dismissed with prejudice.

IT IS SO ORDERED this 1 day of Feb., 1999.

/s/ Christine Pomeroy
JUDGE

Presented by:

CHRISTINE O. GREGOIRE
Attorney General

/s/ Anne Egeler
Anne Egeler, WSBA # 20258
Assistant Attorney General
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Approved as to Form
Notice of Presentation Waived

The Dinces Law Firm

/s/ Franklin G. Dinces

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THURSTON COUNTY

KALAMA CHEMICAL, INC., Plaintiff, -vs- STATE OF WASHINGTON DEPARTMENT OF REVENUE, Defendant.	NO. 98-2-02968-2 ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter having come before the Court for hearing on July 31, 1998, on Plaintiff's Motion For Partial Summary Judgment and the Court having reviewed and considered Plaintiff's Motion For Partial Summary Judgment, Memorandum In Support Thereof, Declaration of John W. Hagen, Defendant's Response to Motion for Summary Judgment together with its Exhibits, Plaintiff's Rebuttal Memorandum in Support of Motion For Partial Summary Judgment and the Court having considered the records and files herein together with the parties' oral arguments by counsel the Court now finds:

1. There are no genuine issues of material fact with respect to Plaintiff's claim for just compensation for taxes paid between January 1, 1980 and June 19, 1985.

2. For the reasons stated in the attached oral opinion, Plaintiff's claim is barred by res judicata ~~and collateral estoppel~~ CAP 10/7/98

THEREFORE IT IS HEREBY ADJUDGED, ORDERED AND DECREED that Plaintiff's motion for partial summary judgment filed June 24, 1998 is denied.

DONE IN OPEN COURT this 7 day of ~~September~~ Oct., 1998.

/s/ C. Pomeroy
CHRISTINE A. POMEROY,
JUDGE

Presented by:

CHRISTINE O. GREGOIRE
Attorney General

/s/ Anne Egeler
ANNE E. EGELER, WSBA No. 20258
Assistant Attorney General
Counsel for Defendant
Department of Revenue

Approved as to form and
notice of presentation waived:

THE DINCES LAW FIRM

FRANKLIN G. DINCES
WSBA No. 13473
Counsel for Plaintiff
Kalama Chemcial

Superior Court of the State of Washington

For Thurston County

[Names And Address Omitted In Printing]

[SEAL]

October 8, 1998

(Filed Oct. 8, 1998)

Mr. Franklin G. Dinces
Attorney at Law
4607 Saddleback Dr. NW
Gig Harbor, WA 98332

Ms. Anne E. Egeler
Assistant Attorney General
PO Box 40123
Olympia, WA 98504-0123

Letter Opinion

Re: *Kalama Chemical, Inc. v. State/Dep't. of Revenue*
Thurston County Cause No. ~~98-2-02968-2~~
9-2-2968-2

Dear Counsel:

The Court reviewed the transcript and the arguments of the July 31, 1998 hearing and although the Court did include collateral estopped in its oral opinion upon reconsideration will delete it as a basis to reject the "taking" and "just compensation" arguments for the tax years 1980 - 1985. The Court will uphold the ruling on "res judicata". I have signed the order presented, a copy of which is attached to this letter opinion.

For the tax years 1985 - 1987 the Court will deny summary judgment on the basis of collateral estopped. This Court finds plaintiffs argument attempt to relitigate

essentially the same issues which have been before the Washington State and U.S. Supreme Courts, which Kalama was a party to. *National Can II,* 109 Wn.2d 878 (1988) *cert denied,* 486 U.S. 1040 (1988).

This Court agrees with the state Attorney General that the cases of *Newsweek, Inc v. Florida,* 118 S. Ct. 904 (1998) and *Dryden v. Madison County,* 118 S. Ct. 1162 (1998) are distinguishable. This is not a "bait and switch" case as in *Newsweek.* Following the *Tyler Pipe decision,* the state of Washington offered a post deprivation remedy in the form of a credit to those taxpayers who have paid taxes to other jurisdictions and as seen in the *McKesson Corp v. Florida Alcohol & Tobacco Division,* 496 US 18 (1990), the U.S. Supreme Court gives to states the flexibility in responding to its determination.

I'll sign Findings of Fact, Conclusion of Law and Order upon presentation.

Very truly yours,

/s/ Christine A. Pomeroy
Christine A. Pomeroy
Judge

Attachments

cc: Court File

IN THE SUPREME COURT OF WASHINGTON
FOR THURSTON COUNTY

KALAMA CHEMICAL INC., and ADVANCED TECHNOLOGY LABORATORIES, INC.	)	No. 89-2-02968-2 No. 89-2-02926-7 (Consolidated)
Plaintiffs,	)	Stipulation and Order
vs.	)	
STATE OF WASHINGTON	)	
Defendant.	)	

STIPULATION OF THE PARTIES

(Filed Nov. 6, 1998)

Each of the parties to *Kalama Chemical, Inc. v. State of Washington, Department of Revenue*, Thurston County No. 89-2-02968-2 and each of the parties in *Advanced Technology Laboratories, Inc. v. State of Washington, Department of Revenue*, Thurston County No. 89-2-02926-7, stipulate and agree to the following:

1. Except for the identity of the plaintiffs and the amount and/or kind of taxes paid by the plaintiffs to Defendant and other jurisdictions all facts material to the resolution of both actions are identical.

2. All legal issues raised by plaintiffs in one action have been raised in the other action.

3. It is in the interests of both parties that the matters be consolidated into one action for purposes of decision, appeal and otherwise. Such consolidation will also result in a judicial economy.

4. The arguments made by both parties in regard to the various motions already brought in *Kalama Chemical, Inc. v. State of Washington, Department of Revenue,* Thurston County No. 89-2-02968-2 would be made by both parties in the other action.

ORDER

THIS MATTER having come before the Court upon the stipulation of the parties pursuant to CR 42, and for good cause shown, it is hereby ORDERED that:

1. *Advanced Technology Laboratories, Inc. v. State of Washington, Department of Revenue,* Thurston County No. 89-2-02926-7 is consolidated into *Kalama Chemical, Inc. v. State of Washington, Department of Revenue,* Thurston County No. 89-2-02968-2.

2. All pleadings and other papers previously filed in *Advanced Technology Laboratories, Inc. v. State of Washington, Department of Revenue,* Thurston County No. 89-2-02968-2.

3. All motions, briefs and other papers filed in *Kalama Chemical, Inc. v. State of Washington, Department of Revenue,* Thurston County No. 89-2-02968-2 on behalf of plaintiff Kalama Chemical, Inc. shall be deemed to have been filed on behalf of plaintiff Advanced Technology Laboratories, Inc. Specifically, Advanced Technology Laboratories, Inc. shall be deemed to have raised every legal and factual argument raised by Kalama Chemical, Inc.

4. All further proceedings in either action shall be filed solely in *Kalama Chemical, Inc. v. State of Washington, Department of Revenue,* Thurston County No. 89-2-02968-2.

5. The date of trial set for *Advanced Technology Laboratories, Inc. v. State of Washington, Department of Revenue,* Thurston County No. 89-2-02926-7 is hereby stricken.

IT IS SO ORDERED this 6th day of November, 1998.

/s/ Christine A. Pomeroy
JUDGE

Presented by:

CHRISTINE O. GREGOIRE
Attorney General

/s/ Cindy R. Evans WSBA #27309 for
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Approved as to Form
Notice of Presentation Waived

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APPENDIX C

THE SUPREME COURT OF WASHINGTON

KALAMA CHEMICAL, INC. and ADVANCED TECHNOLOGY LABORATORIES, INC., Petitioners, v. STATE OF WASHINGTON, Respondent.	NO. 70301-9 **ORDER** C/A NO. 24358-0-II (Filed Mar. 6, 2001)

Department I of the Court considered this matter at its March 6, 2001, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 6th day of March, 2001.

/s/ Gerry J. Allfauden
CHIEF JUSTICE

APPENDIX D

4.56.110 Interest on judgments. Interest on judgments shall accrue as follows:

(1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.

(2) All judgments for unpaid child support that have accrued under a superior court order or an order entered under the administrative procedure act shall bear interest at the rate of twelve percent.

(3) Except as provided under subsections (1) and (2) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof: PROVIDED, That in any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

19.52.020 Highest rate permissible – Setup charges. (1) Any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: (a) Twelve percent per annum; or (b) four percentage points above the equivalent coupon issue yield (as published by the Board

of Governors of the Federal Reserve System) of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the later of (i) the establishment of the interest rate by written agreement of the parties to the contract, or (ii) any adjustment in the interest rate in the case of a written agreement permitting an adjustment in the interest rate. No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater interest for the loan or forbearance of any money, goods, or things in action.

(2)(a) In any loan of money in which the funds advanced do not exceed the sum of five hundred dollars, a setup charge may be charged and collected by the lender, and such setup charge shall not be considered interest hereunder.

(b) The setup charge shall not exceed four percent of the amount of funds advanced, or fifteen dollars, whichever is the lesser, except that on loans of under one hundred dollars a minimum not exceeding four dollars may be so charged.

(3) Any loan made pursuant to a commitment to lend at an interest rate permitted at the time the commitment is made shall not be usurious. Credit extended pursuant to an open-end credit agreement upon which interest is computed on the basis of a balance or balances outstanding during a billing cycle shall not be usurious if

on any one day during the billing cycle the rate at which interest is charged for the billing cycle is not usurious.

82.04.220 Business and occupation tax imposed. There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

82.04.230 Tax upon extractors. Upon every person engaging within this state in business as an extractor; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, extracted for sale or for commercial or industrial use, multiplied by the rate of 0.484 percent.

The measure of the tax is the value of the products, including byproducts, so extracted, regardless of the place of sale or the fact that deliveries may be made to points outside the state.

82.04.240 Tax on manufacturers. Upon every person except persons taxable under RCW 82.04.260 (1), (2), (4), (5), or (6) engaging within this state in business as a

manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, manufactured, multiplied by the rate of 0.484 percent.

The measure of the tax is the value of the products, including byproducts, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state.

82.04.250 Tax on retailers. ***(Effective until July 1, 2001.)*** (1) Upon every person except persons taxable under RCW 82.04.260(5) or subsection (2) of this section engaging within this state in the business of making sales at retail, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of 0.471 percent.

(2) Upon every person engaging within this state in the business of making sales at retail that are exempt from the tax imposed under chapter 82.08 RCW by reason of RCW 82.08.0261, 82.08.0262, or 82.08.0263, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of 0.484 percent.

82.04.270 Tax on wholesalers, distributors. ***(Effective until July 1, 2001.)*** Upon every person except persons

taxable under RCW 82.04.260(5) engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of 0.484 percent.

82.04.4286 Deductions – Nontaxable business. In computing tax there may be deducted from the measure of tax amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.

Pre July 23, 1987 version

82.04.440 Persons taxable on multiple activities. Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in: *Provided,* That persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240 or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold, and that persons taxable under RCW 82.04.240 or RCW 82.04.260 subsection (4) shall not

be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

Post July 23, 1987 version

82.04.440 Persons taxable on multiple activities – Credits. (1) Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in.

(2) Persons taxable under RCW 82.04.250 or 82.04.270 shall be allowed a credit against those taxes for any (a) manufacturing taxes paid with respect to the manufacturing of products so sold in this state, and/or (b) extracting taxes paid with respect to the extracting of products so sold in this state or ingredients of products so sold in this state. Extracting taxes taken as credit under subsection (3) of this section may also be taken under this subsection, if otherwise allowable under this subsection. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale of those products.

(3) Persons taxable under RCW 82.04.240 or 82.04.260 subsection (4) shall be allowed a credit against those taxes for any extracting taxes paid with respect to extracting the ingredients of the products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the manufacturing of those products.

(4) Persons taxable under RCW 82.04.230, 82.04.240, or subsection (2), (3), (4), (5), or (7) of RCW 82.04.260 with respect to extracting or manufacturing products in this state shall be allowed a credit against those taxes for any (i) gross receipts taxes paid to another state with respect to the sales of the products so extracted or manufactured in this state, (ii) manufacturing taxes paid with respect to the manufacturing of products using ingredients so extracted in this state, or (iii) manufacturing taxes paid with respect to manufacturing activities completed in another state for products so manufactured in this state. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the extraction or manufacturing of those products.

(5) For the purpose of this section:

(a) "Gross receipts tax" means a tax:

(i) Which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax; and

(ii) Which is also not, pursuant to law or custom, separately stated from the sales price.

(b) "State" means (i) the state of Washington, (ii) a state of the United States other than Washington, or any political subdivision of such other state, (iii) the District of Columbia, and (iv) any foreign country or political subdivision thereof.

(c) "Manufacturing tax" means a gross receipts tax imposed on the act or privilege of engaging in business as

a manufacturer, and includes (i) the taxes imposed in RCW 82.04.240 and subsections (2), (3), (4), (5), and (7) of RCW 82.04.260, and (ii) similar gross receipts taxes paid to other states.

(d) "Extracting tax" means a gross receipts tax imposed on the act or privilege of engaging in business as an extractor, and includes the tax imposed in RCW 82.04.230 and similar gross receipts taxes paid to other states.

(e) "Business", "manufacturer", "extractor", and other terms used in this section have the meanings given in RCW 82.04.020 through 82.04.212, notwithstanding the use of those terms in the context of describing taxes imposed by other states.

82.32.050 Deficient and delinquent payments – Penalties and interest – Limitations. If upon examination of any returns or from other information obtained by the department it appears that a tax or penalty has been paid less than that properly due, the department shall assess against the taxpayer such additional amount found to be due and as to assessments made on and after May 1, 1965, including assessments for additional tax or penalties due prior to that date shall add thereto interest at the rate of nine percent per annum from the last day of the year in which the deficiency is incurred until date of payment. The department shall notify the taxpayer by mail of the additional amount and the same shall become due and shall be paid within ten days from the date of the notice,

or within such further time as the department may provide. If payment is not received by the department by the due date specified in the notice, or any extension thereof, the department shall add a penalty of ten percent of the amount of the additional tax found due. If the department finds that all or any part of the deficiency resulted from an intent to evade the tax payable hereunder, a further penalty of fifty percent of the additional tax found to be due shall be added.

No assessment or correction of an assessment for additional taxes due may be made by the department more than four years after the close of the tax year, except (1) against a taxpayer who has not registered as required by this chapter, (2) upon a showing of fraud or of misrepresentation of a material fact by the taxpayer, or (3) where a taxpayer has executed a written waiver of such limitation.

82.32.060

(1) If, upon receipt of an application by a taxpayer for a refund or for an audit of the taxpayer's records, or upon an examination of the returns or records of any taxpayer, it is determined by the department that within the statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at the taxpayer's

option. Except as provided in subsections (2) and (3) of this section, no refund or credit shall be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

(2) The execution of a written waiver under RCW 82.32.050 or 82.32.100 shall extend the time for making a refund or credit of any taxes paid during, or attributable to, the years covered by the waiver if, prior to the expiration of the waiver period, an application for refund of such taxes is made by the taxpayer or the department discovers a refund or credit is due.

(3) Notwithstanding the foregoing limitations there shall be refunded or credited to taxpayers engaged in the performance of United States government contracts or subcontracts the amount of any tax paid, measured by that portion of the amounts received from the United States, which the taxpayer is required by contract or applicable federal statute to refund or credit to the United States, if claim for such refund is filed by the taxpayer with the department within one year of the date that the amount of the refund or credit due to the United States is finally determined and filed within four years of the date on which the tax was paid: PROVIDED, That no interest shall be allowed on such refund.

(4) Any such refunds shall be made by means of vouchers approved by the department and by the issuance of state warrants drawn upon and payable from such funds as the legislature may provide. However, taxpayers who are required to pay taxes by electronic

funds transfer under RCW 82.32.080 shall have any refunds paid by electronic funds transfer.

(5) Any judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, penalties, and interest which were paid by the taxpayer, and costs, in a suit by any taxpayer shall be paid in the same manner, as provided in subsection (4) of this section, upon the filing with the department of a certified copy of the order or judgment of the court.

(a) Interest at the rate of three percent per annum shall be allowed by the department and by any court on the amount of any refund, credit, or other recovery allowed to a taxpayer for taxes, penalties, or interest paid by the taxpayer before January 1, 1992. This rate of interest shall apply for all interest allowed through December 31, 1998. Interest allowed after December 31, 1998, shall be computed at the rate as computed under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

(b) For refunds or credits of amounts paid or other recovery allowed to a taxpayer after December 31, 1991, the rate of interest shall be the rate as computed for assessments under RCW 82.32.050(2) less one percent. This rate of interest shall apply for all interest allowed through December 31, 1998. Interest allowed after December 31, 1998, shall be computed at the rate as computed under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

82.32.090 Late payment – Penalties. If payment of any tax due is not received by the department of revenue by the due date, there shall be assessed a penalty of five percent of the amount of the tax; and if the tax is not received within thirty days after the due date, there shall be assessed a total penalty of ten percent of the amount of the tax; and if the tax is not received within sixty days after the due date, there shall be assessed a total penalty of twenty percent of the amount of the tax. No penalty so added shall be less than two dollars.

If payment of any tax is received within the first ten days of the month next succeeding the month in which the tax is payable, the amount of such payment shall be credited to, and shall be treated for all purposes as having been collected during, the fiscal year which includes the month preceding the month in which such due date falls. Effective June 30, 1985, and thereafter if the payment of any tax is received during the first ten days in July, the amount of such payment shall be credited to, and shall be treated for all purposes as having been collected during, the preceding fiscal year.

If a warrant be issued by the department of revenue for the collection of taxes, increases, and penalties, there shall be added thereto a penalty of five percent of the amount of the tax, but not less than five dollars.

Notwithstanding the foregoing, the aggregate of penalties imposed under this chapter for failure to file a return, late payment of any tax, increase, or penalty, or

issuance of a warrant shall not exceed twenty-five percent of the tax due, or seven dollars, whichever is greater.

82.32.150 Contest of tax – Prepayment required – Restraining orders and injunctions barred. All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.

82.32.170 Reduction of tax after payment – Petition – Conference – Determination by department. Any person, having paid any tax, original assessment, additional assessment, or corrected assessment of any tax, may apply to the department within the time limitation for refund provided in this chapter, by petition in writing for a correction of the amount paid, and a conference for examination and review of the tax liability, in which petition he shall set forth the reasons why the conference should be granted, and the amount in which the tax, interest, or penalty, should be refunded. The department shall promptly consider the petition, and may grant or deny it. If denied, the petitioner shall be notified by mail

thereof forthwith; if a conference is granted, the department shall notify the petitioner by mail of the time and place fixed therefor. After the hearing the department may make such determination as may appear to it just and lawful, and shall mail a copy of its determination to the petitioner.

82.32.180 Court appeal – Procedure. Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24 RCW, having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32 assessment, and a conference for examination and review of the assessment. The petition shall set forth the reasons why the correction should be granted and the amount of the tax, interest, or penalties, which the petitioner believes to be due. The department shall promptly consider the petition and may grant or deny it. If denied, the petitioner shall be notified by mail thereof forthwith. If a conference is granted, the department shall fix the time and place therefor and notify the petitioner thereof by mail. After the conference the department may make such determination as may appear to it to be just and lawful and shall mail a copy of its determination to the petitioner. If no such petition is filed within the twenty day period the assessment covered by the notice shall become final.

The procedures provided for herein shall apply also to a notice denying, in whole or in part, an application for

a pollution control tax exemption and credit certificate, with such modifications to such procedures established by departmental rules and regulations as may be necessary to accommodate a claim for exemption or credit.

82.32.210 Tax warrant – Filing – Lien – Effect. If any tax, increase, or penalty or any portion thereof is not paid within fifteen days after it becomes due, the department of revenue may issue a warrant under its official seal in the amount of such unpaid sums, together with interest thereon at the rate of one percent of the amount of such warrant for each thirty days or portion thereof after the date of such warrant. If, however the department of revenue believes that a taxpayer is about to cease business, leave the state, or remove or dissipate the assets out of which taxes or penalties might be satisfied and that any tax or penalty will not be paid when due, it may declare the tax or penalty to be immediately due and payable and may issue a warrant immediately.

The department shall file a copy of the warrant with the clerk of the superior court of any county of the state in which real and/or personal property of the taxpayer may be found. Upon filing, the clerk shall enter in the judgment docket, the name of the taxpayer mentioned in the warrant and in appropriate columns the amount of the tax or portion thereof and any increases and penalties for which the warrant is issued and the date when the copy is filed, and thereupon the amount of the warrant so docketed shall become a specific lien upon all goods,

wares, merchandise, fixtures, equipment, or other personal property used in the conduct of the business of the taxpayer against whom the warrant is issued, including property owned by third persons who have a beneficial interest, direct or indirect, in the operation of the business, and no sale or transfer of the personal property in any way affects the lien. The lien shall not be superior, however, to bona fide interests of third persons which had vested prior to the filing of the warrant when the third persons do not have a beneficial interest, direct or indirect, in the operation of the business, other than the securing of the payment of a debt or the receiving of a regular rental on equipment: *Provided, however,* That the phrase "bona fide interests of third persons" does not include any mortgage of real or personal property or any other credit transaction that results in the mortgagee or the holder of the security acting as trustee for unsecured creditors of the taxpayer mentioned in the warrant who executed the chattel or real property mortgage or the document evidencing the credit transaction. The amount of the warrant so docketed shall thereupon also become a lien upon the title to and interest in all other real and personal property of the taxpayer against whom it is issued the same as a judgment in a civil case duly docketed in the office of the clerk. The warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the state in the manner provided by law in the case of judgments wholly or partially unsatisfied.

82.32.215 Revocation of certificate of registration. If any warrant issued under this chapter is not paid within thirty days after it has been filed with the clerk of the superior court, or if any taxpayer is delinquent, for three consecutive reporting periods, in the transmission to the department of revenue of retail sales tax collected by him, the department of revenue may, by order issued under its office seal, revoke the certificate of registration of the taxpayer against whom the warrant was issued, and, if the order is entered, a copy thereof shall be posted in a conspicuous place at the main entrance to the taxpayer's place of business and shall remain posted until such time as the warrant has been paid. Any certificate so revoked shall not be reinstated, nor shall a new certificate of registration be issued to the taxpayer, until the amount due on the warrant has been paid, or provisions for payment satisfactory to the department of revenue have been entered, and until the taxpayer has deposited with the department of revenue such security for payment of any taxes, increases, and penalties, due or which may become due in an amount and under such terms and conditions as the department of revenue may require, but the amount of the security shall not be greater than one-half the estimated average annual liability of the taxpayer.

82.32.220 Execution of warrant – Levy upon property – Satisfaction. The department of revenue may issue an order of execution, pursuant to a filed warrant, under its official seal directed to the sheriff of the county in which

the warrant has been filed, commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county, or so much thereof as may be necessary, for the payment of the amount of the warrant, plus the cost of executing the warrant, and return the warrant to the department of revenue and pay to it the money collected by virtue thereof within sixty days after the receipt of the warrant. The sheriff shall thereupon proceed upon the same in all respects and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgments of the superior court.

The sheriff shall be entitled to fees as provided by law for his services in levying execution on a superior court judgment and the clerk shall be entitled to a filing fee as provided by law, which shall be added to the amount of the warrant.

The proceeds received from any sale shall be credited upon the amount due under the warrant and when the final amount due is received, together with interest, penalties, and costs, the judgment docket shall show the claim for taxes to be satisfied and the clerk of the court shall so note upon the docket. Any surplus received from any sale of property shall be paid to the taxpayer or to any lien holder entitled thereto. If the return on the warrant shows that the same has not been satisfied in full, the amount of the deficiency shall remain the same as a judgment against the taxpayer which may be collected in the same manner as the original amount of the warrant.

APPENDIX E

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

KALAMA CHEMICAL, INC. Plaintiff, v. STATE OF WASHINGTON, and DEPARTMENT OF REVENUE, STATE OF WASHINGTON, Defendants.	No. 89-2-02968-2 COMPLAINT FOR JUST COMPENSATION AND FOR REFUND OF TAXES (Filed Dec. 28, 1989)

Plaintiff alleges:

1. Plaintiff Kalama Chemical, Inc. is a corporation duly organized and existing under the laws of the State of Washington and has paid all fees due to the State of Washington.

2. Defendant Department of Revenue is an administrative agency of the State of Washington responsible for the collection of Washington state excise taxes.

3. In *Tyler Pipe Indus. v. Washington Dep't of Rev.*, 483 U.S. 232, 107 S. Ct. 2810, 97 L.Ed.2d 199 (1987), the United States Supreme Court held that the manufacturing business and occupation ("B&O") tax of the State of Washington that was imposed at all times between January 1, 1980 and June 23, 1987 was unconstitutional as applied to taxpayers in the position of plaintiff.

4. Plaintiff was a party before the court in *Tyler Pipe*.

5. For activities performed between December 1, 1979 and June 23, 1987, plaintiff involuntarily paid under threat of penalties, interest and business closure, $869,119 pursuant to the manufacturing B&O tax that was held unconstitutional in *Tyler Pipe*. Of that amount, $511,016 was paid between January 1, 1980 and June 19, 1985 and was the amount sought as a refund by plaintiff in *Tyler Pipe*. The remaining $358,103 was paid after June 19, 1985 and no refund action has been brought previously by plaintiff to recover such amount.

6. *National Can Corp. v. Dep't of Rev.*, 109 Wash.2d 878, 749 P.2d 1286, *appeal dismissed and cert denied*, 108 S. Ct. 2030 (1988), denied plaintiff a refund of the manufacturing taxes it paid between January 1, 1980 and June 19, 1985.

7. The Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment, provides in pertinent part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8. Article I, §16 of the Washington Constitution provides in pertinent part that:

> No private property shall be taken . . . for public or private use without just compensation having first been made . . .

9. The State of Washington's refusal to refund the unconstitutional manufacturing B&O tax payments pursuant to the Washington Supreme Court's decision in *National Can Corp. v. Dep't of Revenue*, constituted a taking

of defendant's property for which just compensation is required within the meaning of the Fifth Amendment to the United States Constitution and Article I, §16 of the Washington Constitution.

10. RCW 82.04.4286 provides a deduction from the measure of the B&O tax for amounts derived from business which the state is prohibited from taxing under the Constitution of the United States.

11. Plaintiff is entitled under RCW 82.04.4286 to a refund of the taxes it paid between June 19, 1985 and June 23, 1987. In the alternative, such amounts were also taken from plaintiff without just compensation as described in paragraph 9.

12. The statutory rate of interest of tax refunds is 3 percent. Such a rate is confiscatory and discriminatory in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the Washington State Constitution. Other litigants receive prejudgment interest at the rate of 12 percent per annum and the true cost of money exceeds 3 percent.

WHEREFORE, plaintiff prays for:

1. An order requiring defendant to refund the $358,103 of taxes paid between June 19, 1985 and June 23, 1987 plus 12 percent interest thereon from the date paid to the date refunded.

2. Just compensation equal to the amount of money taken from plaintiff between January 1, 1980 and June 19, 1985 ($511,016) plus reasonable interest.

3. Plaintiff's reasonable costs and disbursements herein.

4. Such other and further relief as this Court deems appropriate.

DATED this 27 day of December, 1989.

STOEL RIVES BOLEY JONES & GREY

By: /s/ Franklin G. Dinces
Franklin G. Dinces
Peter R. Jarvis
Attorneys for Plaintiff

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

ADVANCED TECHNOLOGY LABORATORIES, INC., Plaintiff, v. STATE OF WASHINGTON, and DEPARTMENT OF REVENUE, STATE OF WASHINGTON, Defendants.	No. 89-2-02926-7 FIRST AMENDED COMPLAINT FOR JUST COMPENSATION AND FOR REFUND OF TAXES (Filed Dec. 28, 1989)

Plaintiff alleges:

1. Plaintiff Advanced Technology Laboratories, Inc. is a corporation duly organized and existing under the laws of the State of Washington and has paid all fees due to the State of Washington.

2. Defendant Department of Revenue is an administrative agency of the State of Washington responsible for the collection of Washington state excise taxes.

3. In *Tyler Pipe Indus. v. Washington Dep't of Rev.*, 483 U.S. 232, 107 S. Ct. 2810, 97 L.Ed.2d 199 (1987), the United States Supreme Court held that the manufacturing business and occupation ("B&O") tax of the State of Washington that was imposed at all times between January 1, 1980 and June 23, 1987 was unconstitutional as applied to taxpayers in the position of plaintiff.

4. Plaintiff was a party before the court in *Tyler Pipe*.

5. Between January 1, 1980 and June 23, 1987, plaintiff involuntarily paid under threat of penalties, interest and business closure, $1,628,129.46 pursuant to the manufacturing B&O tax that was held unconstitutional in *Tyler Pipe*. Of that amount, $1,148,055.65 was paid between January 1, 1980 and June 19, 1985 and was the amount sought as a refund by plaintiff in *Tyler Pipe*. The remaining $480,073.81 was paid between June 19, 1985 and June 23, 1987 and no refund action has been brought previously by plaintiff to recover such amount.

6. *National Can Corp. v. Dep't of Rev.*, 109 Wash.2d 878, 749 P.2d 1286, *appeal dismissed and cert denied*, 108 S. Ct. 2030 (1988), denied plaintiff a refund of the manufacturing taxes it paid between January 1, 1980 and June 19, 1985.

7. The Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment, provides in pertinent part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8. Article I, §16 of the Washington Constitution provides in pertinent part that:

> No private property shall be taken . . . for public or private use without just compensation having first been made . . .

9. The State of Washington's refusal to refund the unconstitutional manufacturing B&O tax payments pursuant to the Washington Supreme Court's decision in *National Can Corp. v. Dep't of Revenue*, constituted a taking

of defendant's property for which just compensation is required within the meaning of the Fifth Amendment to the United States Constitution and Article I, §16 of the Washington Constitution.

10. RCW 82.04.4286 provides a deduction from the measure of the B&O tax for amounts derived from business which the state is prohibited from taxing under the Constitution of the United States.

11. Plaintiff is entitled under RCW 82.04.4286 to a refund of the taxes if paid between June 19, 1985 and June 23, 1987. In the alternative, such amounts were also taken from plaintiff without just compensation as described in paragraph 9.

12. The statutory rate of interest for tax refunds is 3 percent. Such a rate is confiscatory and discriminatory in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the Washington State Constitution. Other litigants receive prejudgment interest at the rate of 12 percent per annum and the true cost of money exceeds 3 percent.

WHEREFORE, plaintiff prays for:

1. An order requiring defendant to refund the $480,073.81 of taxes paid between June 19, 1985 and June 23, 1987, plus 12 percent interest thereon from the date paid to the date refunded.

2. Just compensation equal to the amount of money taken from plaintiff between January 1, 1980 and June 19, 1985 ($1,148,055.65) plus reasonable interest.

3. Plaintiff's reasonable costs and disbursements herein.

4. Such other and further relief as this Court deems appropriate.

DATED this [illegible] day of December, 1989.

STOEL RIVES BOLEY JONES & GREY

By: /s/ Franklin G. Dinces
Franklin G. Dinces
Peter R. Jarvis
Attorneys for Plaintiff

IN THE SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

KALAMA CHEMICAL, Plaintiff, -vs- STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Defendant.	No. 89-2-02968-2 Response to Motion for Summary Judgment

* * *

D. The *Newsweek* and *Dryden* Cases Are Clearly Distinguishable.

Kalama is now relying on an additional case, *Newsweek, Inc. v. Florida*, ___ U.S. ___, 118 S.Ct. 904, 139 L.Ed.2d 888 (1998). Florida law exempted newspapers, but not magazines, from sales tax. After the law was struck down, Newsweek filed a tax refund claim. Florida's refund statutes were ambiguous. One statute permitted taxpayers to contest a tax *before* paying it. *Id.*, 139 L.Ed.2d at 890. However, a second statute allowed taxpayers to seek a refund *after* paying the tax. *Id.* at 891. The state court denied Newsweek's refund request because the company could have challenged the tax before paying it. The U.S. Supreme Court reversed. States cannot "bait and switch" by offering a postdeprivation remedy, and then withdrawing that remedy after the taxes are paid. *Id.*

Following the ruling in *Newsweek*, the court vacated a second Florida tax refund case and remanded it for reconsideration in light of *Newsweek*. *Dryden v. Madison Cy.*, ___ U.S. ___, 118 S. Ct. 1162, 140 L. Ed. 2d 173 (1998).[5]

It is difficult to understand why Kalama cites *Newsweek* and *Dryden*. In sharp contrast to Florida, Washington has not engaged in "bait and switch" tactics. It has always offered a postdeprivation remedy. Following *Tyler Pipe*, the Legislature provided a postdeprivation remedy in the form of the 1987 credit law. As the state Supreme Court noted in *American Nat'l Can*, the remedy was not illusory. The state refunded substantial sums to taxpayers who had paid gross receipts taxes to other jurisdictions. Unlike the taxpayers who were entitled to a refund, Kalama has not suffered harm by paying a gross receipts tax to another jurisdiction. *Newsweek* did not overrule the Court's decision in *McKesson*. Therefore, *Newsweek*, cannot be contorted to stand for the proposition that states are required to provide a windfall refund to taxpayers who have never suffered an injury.

Furthermore, as Kalama concedes, the decision in *Newsweek* is based on *Reich v. Collins*, 516 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994). *Reich* was decided before the state Supreme Court issued its opinion in *Digital*. In fact, Digital relied on *Reich* and the "bait and switch" argument in its briefs and oral argument to the state Supreme Court and in its Petition for Certiorari to the

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[5] The *Newsweek* and *Dryden* opinions were issued before Kalama filed its first motion.

U.S. Supreme Court.[6] the argument was unsuccessful with both Courts.

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[6] *See* Digital's Opening Brief to the Washington Supreme Court at 31-33 (May 3, 1995); Transcript of Oral Argument at 18, 36-40; Petition for Writ of Certiorari at 22-23 (Feb. 6, 1997).